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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-725

EUGENE LAGANA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issued to review the judgment of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, entered in the above entitled case on June 10, 1975 and reported at _____A.D. 2d_____(Not yet officially reported).

A. OPINION BELOW

Opinions were rendered below. The first thereof was rendered by the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York unanimously reversing the conviction and dismissing the indictment on January 4, 1974. Said opinion is appended to this petition as appendix "A" and is officially reported at 350 N. Y. S. 2d 747 43 A. D. 2d 834.

The second opinion herein was returned to the New York Court of Appeals, which unanimously reversed the aforementioned judgment of the Appellate Division, and remitted the case to said Appellate Division for consideration on the facts. The opinion of the Court of Appeals, dated February 17,1975 is appended to this petition as appendix "B", and is officially reported at 36 N. Y. 2d 71.

Pursuant to said remission, the Appellate

Division reconsidered its original judgment of reversal and, on June 10, 1975 unanimously affirmed the original judgment of conviction. No opinion was rendered in connection therewith. The order of affirmance is appended to this petition as appendix "C", and is officially reported at _____ A.D. 2d _____(Not yet officially reported).

Petitioner thereafter made a timely application to the New York Court of Appeals for a leave to appeal from said affirmance by the Appellate Division. Said application was denied on August 25, 1975, by the Hon. Jacob D. Fuchsberg, an associate Judge of the New York Court of Appeals. His certificate denying leave to appeal set forth that Federal Constitutional questions were raised and decided adversely to petitioner. Said certificate, denying leave to appeal to the New York Court of Appeals is appended to this petition as appendix "D".

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment sought to be reviewed herein is the judgment of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, made on June 10, 1975, and appended hereto as appendix "C".

Jurisdiction in this Court is invoked under Title 28, United States Code, Section 1257 (2) and Rule 19 subdivision 1 of the rules of this Court.

C. THE QUESTIONS PRESENTED FOR REVIEW

(1) Was the alleged identification of the defendant, while he lay bandaged in a hospital room, among other patients, who were not bandaged, a Constitutionally permissible procedure, so as to allow an in court identification predicated exclusively upon the validity of the hospital identifica-

tion.

(2) Was the post-arrest enactment of Section 60.25 of the New York Criminal Procedure Law ex post facto and violation of due process of law as to this petitioner where such enactment altered the rules of evidence so as to permit at the trial a hearsay identification of appellant where under the law in effect at the time of petitioner's arrest such hearsay identification was inadmissible upon the trial.

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Article 1, Section 10 and the Fourteenth Amendment to the United States Constitution. The pertinent portions thereof are set forth in appendix "E" to this petition.

Statutes involved are Section 393 - b of the former Code of Criminal Procedure of the State of

New York and Section 60.25 of the present Criminal Procedure Law of the State of New York, which are set forth in pertinent part in appendix "F" to this petition.

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTINENT TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner was indicted in the Supreme Court of the State of New York, County of Kings for the crime of Murder in the First Degree. In essence, it was the contention of the prosecution that petitioner had been in a cabaret in Brooklyn, New York, known as the Revelation Club, and there had become involved in an altercation with the deceased. Subsequent to that altercation, the prosecution contended that petitioner left the premises and returned a short time later at which time he allegedly shot and killed the deceased on the sidewalk in front of the premises. The case, as all Courts

acknowledged was a wholly circumstancial case.

A jury trial in the Supreme Court of Kings County, presided over by Hon. Hyman Barshay, a justice of said Court, was held during the month of November, 1972. At the conclusion of the trial, the jury rendered its verdict, finding appellant guilty of manslaughter in the first degree.

Thereafter on February 1, 1973, petitioner was sentenced by Mr. Justice Barshay to an indeterminate term of imprisonment, not to exceed 25 years. Petitioner was at liberty upon bail, pending the determination of the various appeals heretofore described, but surrendered himself following the affirmance of the conviction by the Appellate Division, Second Judicial Department. He is presently incarcerated pursuant to said judgment of conviction.

As previously indicated the first appeal to the Appellate Division resulted in a reversal of the

conviction and dismissal of the indictment, upon the grounds that the evidence was insufficient in law to warrant the conviction. Thereafter the District Attorney appealed to the Court of Appeals which court reversed the Appellate Division, and remanded it to that court for its determination on the facts. Following such remand, the Appellate Division affirmed the judgment of conviction. Thereafter a timely application to the Court of Appeals for leave to appeal to that court was denied.

The basic facts of the case are extensively set forth in the opinions below, appended as exhibit "A" and "B", and, accordingly, are not reiterated herein.

The evidentiary facts pertinent to the argument, infra, are set forth in detail under the point headings and, accordingly, are not reiterated herein.

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED

Each of the issues raised by this petition were raised in the State Courts as follows:

1. The issue with respect to the Constitutional propriety of the identification procedures employed and introduced at the trial was raised at the earliest opportunity permitted under State law, namely by a pre-trial hearing to test out the constitutional validity of the identification procedures. The denial of the motion to suppress such identification and to exclude it from evidence at the trial was argued and raised at that stage of the proceedings, upon the trial and in the briefs throughout the various appeals in the State courts. (See Point One, infra).

2. The issue with respect to the ex post facto change in the New York Criminal Procedure

Law, was not raised below but, rather, arises from the opinion of the New York Court of Appeals (appendix "B"), that the new Criminal Procedure Law authorizes the identification procedures employed at the trial, despite the fact that the previous Code of Criminal Procedure in affect at the time of petitioner's arrest, would have precluded it. The Appellate Division had held (appendix "A") that the identification procedures used were error since the new section did not alter the existing law.

G. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

POINT ONE

THE CIRCUMSTANCES UNDER WHICH THE WITNESS ZACCARIO ALLEGEDLY SAW AND IDENTIFIED THE PETITIONER IN A HOSPITAL WAS INHERENTLY UNFAIR AND VIOLATIVE OF PETITIONER'S CONSTITUTIONAL RIGHTS

As previously indicated, it was the theory of

the prosecution that petitioner was involved in an altercation with the deceased in the Revelation Club, and that petitioner thereupon left the club and returned a short time later to shoot the deceased on the sidewalk in front of the club.

Toward that end, the prosecution called one Margaret Zaccario and, to bolster her identification testimony, Detective Warren O'Brien.

We summarize now the testimony of both witnesses at the trial and at the pre-trial identification hearing (Wade Hearing)

Margaret Zaccario:

On the evening of August 2, 1970, the date of the events in question, she visited the Revelation Club on 4th Avenue in Kings County. Another woman by the name of Maureen Crowe, whom she knew as an employee there was present when she arrived. Some time thereafter Pendolino, (the deceased) arrived at around midnight.

Later in the evening she was in the botique area of the Revelation Club with Maureen Crowe, Billy Ladone and the deceased. She observed a man (whose name she did not know at the time but, said she learned it later), have words with Pendolino. After that, she "thinks he ran at Joey". After that, she ran into the telephone booth. She did not see any physical contact between the man and Pendolino.

The very last thing she saw in terms of the man and the deceased, was when she saw the man "running at" the deceased.

After going into the telephone booth, Ms. Zaccario heard the sound of glass breaking in the botique area. She was unable to see the botique area from where she was in the telephone booth. The telephone booth was so situated that someone leaving the botique area to exit from the front of the club to 4th Avenue, would necessarily pass the booth. She later saw the man pass

by the telephone booth. He was walking out "wobbly" and "had a big blob of blood hanging from his face".

A few minutes later she left the club. Before leaving the club she went through the botique area, toward the bar area. She did not see Pendolino. She did not see the deceased at any time after she had first observed him at the botique area.

Ms. Zaccario further testified, that after she was leaving the club, going out the door, she heard a few shots coming from the street.

Although Ms. Zaccario stated that she subsequently was told that the man's name was Lagana, she nonetheless flatly stated in Court, when twice asked to look arount the Courtroom to see if she saw the man Lagana, that she was testifying about in Court, "no, I don't", and "I don't know the man." And "I can't" identify some-

one in the Courtroom as the person she spoke about.

Ms. Zaccario was subsequently recalled to the stand for further direct examination, after other witnesses had testified. She stated that on the evening of August 2, into August 3, she had occasion to go to Coney Island Hospital in the company of Detective O'Brien and other detectives. She was taken into one of the wards. She was asked to try to identify the man who was in the fight with Pendolino. She saw three or four men in beds in the ward. She went to one of the beds, where she saw a man with bandages. She was asked whether he was the man in the fight. She said that she identified the man in the bandages, but didn't know who he was. She further testified that she probably looked at his face, but does not remember. The one thing that stood out in her mind were the bandages.

Ms. Zaccario further stated that at that earlier time she identified the man in the bandages as being the man going at Pendolino in the club, she did not know, as she sat on the stand whether it was , infact the same man.

When asked whether her inability to identify anybody in the Courtroom was based upon personal fear upon her part, she said"no". On cross-examination she stated that the man who had the fight with Joey Pendolino was observed by her only for a "split second", and she didn't get a good look at that man's face.

She further stated that when she saw the man walk by her, while she was in the phone booth, that observation was also only a split second observation.

She further testified that she could not say whether the man that walked by the phone booth was infact the same man that was involved in the fight with Pendolino, because she did not have

sufficient opportunity either to look at the man who was in the fight with Pendolino, or to look at the man that walked by the phone booth with blood oh his face.

She was then asked to look at Lagana, to see if she could tell the Court if Lagana was the man in the fight with Pendolino. She answered "no I can't".

She was then asked if she could tell the Court whether Lagana was the man that walked away with blood on his face. Again she answered, "no", I can't".

Ms. Zaccario further testified, that when she observed the man with the bandages in the hospital, she couldn't even see his face because his face was all covered with bandages. She went on to state that all she remembered was bandages.

She testified that as she sat on the witness stand, she could not tell the Court whether or

not the man she saw in the hospital bed was the same man that was involved in the fight with Pendolino. She also stated that she could not tell whether the man she saw in the hospital bed was the same man that walked by the telephone booth with blood on his face.

She stated that the lighting conditions in the botique area of the bar was "very dim", and the lighting conditions in front of the phone booth was also "very dark there".

Ms. Zaccario also testified that she could not tell whether she ever saw Lagana at the Revelation Club that night.

Warrent O'Brien:

Detective O'Brien was assigned to the detective's squad in the 64th Precinct in Brooklyn and, conducted the investigation of the shooting at the Revelation Club.

During the course of his investigation, he

met the witness Margaret Zaccario at about 2:30 a.m. on August 3rd. at the 64th Precinct. He went with her to the hospital, to ward 7-W on the third floor. There were six or seven patients in that ward. After they walked through the ward, Ms. Zaccario said that one of the persons there was the same person who had been in an altercation that she had previously reported. O'Brien later learned that the individual that she pointed out was Lagana, whom he pointed out in the courtroom.

On cross-examination Detective O'Brien stated that prior to going to the hospital, he did not know Lagana or what he looked like. On the way to the hospital he told Ms. Zaccario that they were going there for the purpose of making an identification of a man who had been cut during the course of the fight with Pendolino. When they reached the hospital he inquired at the information desk and learned

that the individual that the police had brought in was in ward 7-W. Ms. Zaccario might have been in proximity to him at that time. When he got to the third floor there were several uniformed policemen there to whom he spoke with Ms. Zaccario present. When he got into the room there were policement stationed within six feet of the bed. Lagana was the only one with the bandages on his face or cuts on his face. The defendant was unconscious at the time and his face was completely or substantitally bandaged.

It was under these circumstances that Ms. Zaccario identified Lagana.

A pre-trial Wade Hearing was held with respect to the witness Margaret Zaccario's alleged identification. It developed during the hearing that she did not make an in-court identification of the defendant. Accordingly, at that point, prior to trial, the motion was terminated, the court

holding that "there is nothing for the court to suppress." The Wade Hearing was re-opened during the trial when the District Attorney sought under the porported authority of section 60.25, of the Code of Criminal Procedure, to have Detective O'Brien testify, in substance, that Ms. Zaccario had identified the defendant at Coney Island Hospital. The Court ultimately ruled, over objection, that it would receive O'Brien's testimony on the subject.

Margaret Zaccario:

This witness' testimony was substantially similar to that which she ultimately gave at the trial. She testified, before the trial, that she went with several detectives to a ward in the Coney Island Hospital where she was asked to identify a man laying in bed as the man who could have started the fight at the Revelation. She further testified: "I think I said that it was this man."

When asked to look around the courtroom, to see if she saw that man in the courtroom, she said that she could not recall, because the events occurred two and a half years ago and the man in the hospital had his whole face bandaged. When asked whether the person she had seen in the club botique was the same man she later saw leaving the club with blood on his face, was the same person, she replied that she could not.

When asked whether the man she saw in the hospital was the same person who had entered the botique, or who left the botique with blood on his face, she replied that she could not.

She was then shown a stenographically recorded, but unsigned and unsworn, statement given to her by the District Attorney in an attempt to refresh her memory. She was then asked whether she recalled the various questions and answers from the statement, she answered she

did not. In response to the question by the court whether the statements refreshed her recollection with respect to the identity of the person she saw in the bed, as the person with blood in the botique, she responded that it did not.

The following then appears in the record.

> " THE COURT: Look at the defendant and tell the Court whether or not you recognize him as being (a) participating in the fight, who emerged with blood, and whom you saw at the hospital? Look at him."
> " THE WITNESS: No."

On cross-examination, she stated that while she was in the telephone booth in the club, she saw a man walking out with blood on his face, but she could not say whether that man was the same man who had the fight with Pendolino. She had only seen the man in the fight for a split second, and did not get a good look at his face. She could not state if the defendant was the man in the fight.

She further stated that prior to going to the hospital with the detectives, they suggested to

her that she was going to identify the man that was involved in the fight with Pendolino. She stated that she identified the man at the hospital because it was suggested to her by the police. She also stated that she identified the man in the bed as being the man involved in the fight, because the police told her that he was the man in the fight.

Warren O'Brien:

During the course of the trial, the Wade Hearing was re-opened on application by the District Attorney, over objection by the defendant.

Detective O'Brien now testified that he went to ConeyIsland Hospital with Ms. Zaccario. On the way to the hospital he told her that they were going there for a possible identification. When they arrived at the hospital ward, he and Ms. Zaccario walked the length of the ward, they then returned to the entrance door, at which time, she

stated that the man who was in the fight at the bar, was in the second bed and got the cut on his face. O'Brien then stated that the individual whom she identified in the hospital was the defendant. Detective O'Brien denied that anyone including himself, had made any suggestions to her.

The court ruled that pursuant to the Code of Criminal Procedure, Section 60.25, O'Brien would be allowed, at the trial, before the jury to testify to the alleged identification made by Ms. Zaccario.

Section 60.25 of the Criminal Procedure Law recognizes that as a condition of allowing a witness to testify to another witness' prior pretrial identification of the defendant on trial, the circumstances of the prior identification must have been held under circumstances consistent with the defendant's Constitutional Rights and safeguards.

Paragraph 1, subd. (a)(ii) of Section 60.25

C. P. L. authorizes the giving of such testimony when the following conditions, among others, are met:

> "(ii) On a subsequent occasion, but prior to the criminal proceeding, he observed, under circumstances consistent with such rights as an accused person may derive under the Constitution of this state or of the United States, a person whom he observed on the first or incriminating occasion...." (Italics ours)

The burden of proof is upon the prosecution to establish by clear and convincing evidence that the circumstances under which Ms. Zaccario identified the appellant while in the hospital ward was constitutionally untainted. (People v. Ratiming, 26 N. Y. 2d 411, 311 N. Y. S. 2d 292).

The trial court found, after the Wade Hearing, that the identification "was untainted and not made pursuant to suggestion of any kind by the police officer". Appropriate exception was taken by

defense counsel.

Overlooked by the trial court however, was that the undisputed circumstances under which the hospital identification was conducted were themselves constitutionally tainted and inherently prejudicial.

More specifically, we refer to the fact testified to by the prosecution's witnesses and found as a fact by the court, that Ms. Zaccario was asked to identify the defendant from among six men each in a separate bed in the hospital ward.

Ms. Zaccario had, a few hours earlier, observed a man who shot the deceased. The man she observed walking out of the club was cut and bleeding from his face. She did not get a good look at his face, having seen him for only a split second.

When later brought to the hospital to view

the six men in the ward, none of the men, except the appellant had bandages on his face. The trial court found as a fact in the circumstances of the identification, "That the man in the bed [appellant] was the only one with a bandage on his face".

We therefore respectfully urge that the circumstances in which the identification was made were constitutionally impermissible. The physical setting to which she was brought was patently and inherently unfair even before she entered the hospital ward. Of the six men she viewed, five could not possibly have been the man she earlier saw with his face cut and bleeding.

By Detective O'Brien's own testimony Ms. Zaccario was told she was going there'for a possible identification of the man that was involved in the fight". As the trial court noted in its findings, "there were police in the approximate vicinity of that bed where that person [appellant]

was.

We note, firstly, the general legal principles which have emerged from the reported cases as to the dangerous interplay between suggestiveness and misidentification. The primary evil to be avoided is "a very substantial likelihood of irreparable misidentification". (Simmons vs. United States, 390 U. S. at 384, 19 L. Ed 2d 1247, 88 S. Ct. 967).

In Neil v. Biggers, 409, U. S. 188 198-199, 34 L. Ed. 2d 401, 93 S. Ct. 375, the Court, in considering the previously mentioned statement from Simmons vs. United States (supra), stated at 409 U. S. 198-199:

> "While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself....

> "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."

The suggestiveness in the procedures used in the instant case are obvious and identical in principle with the procedures condemned by the United States Supreme Court in Foster vs. California, 394 U.S. 440, 441, 442, 22 L. Ed. 2d 402, 89 S. Ct. 1127. In that case the defendant was placed in a line-up with two others. The line-up was described by Mr. Justice Fortas in his opinion as follows (394 U.S. 441):

> "There were three men in the line-up. One was petitioner. He is a tall man - close to six feet in height. The other two men were short-five feet five or six inches. Petitioner wore a leather jacket which David (the only witness) said was similar to the one he had seen underneath the coveralls worn by the robber." (page 405-406)

Mr. Justice Fortas, applying the standard announced in Simmons vs. United States (supra)

stated at 394 U. S. 442:

> "Judged by that standard, this case presents a compelling example of unfair line-up procedures. In the first line-up arranged by the police petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber."

We, therefore, respectfully urge that the identification procedures employed in the case at bar fall well within the ambit of constitutionally impermissible identification procedures as defined in Simmons and Neil (supra) and exemplified in Foster.

By reason of the foregoing, it was error for the trial court to permit Detective O'Brien to testify to an identification obtained in circumstances not "consistent with such rights as an accused person may derive under the Constitution of this State or of the United States". (Crim. Pro. Law §60.25, Par. 1, subd. [a][ii]).

It would therefore also follow that a substantial factor in the evidence upon which the Court of Appeals relied to uphold the sufficiency of the verdict, would be negated, leaving the remaining evidence factually deficient. A new trial should have been ordered.

POINT TWO

THE IDENTIFICATION OF PETITIONER WAS PREDICATED UPON AN EX POST FACTO CHANGE IN THE NEW YORK CRIMINAL PROCEDURE LAW AUTHORIZING HEARSAY EVIDENCE OF IDENTIFICATION CONTRARY TO THE NEW YORK LAW IN EFFECT AT THE TIME OF THE ALLEGED COMMISSION OF THE OFFENSE AND AT THE TIME OF THE ARREST OF PETITIONER

The conviction below was, as noted by the New York Court of Appeals and the Appellate Division, based wholly upon circumstantial evidence.

It was the theory of the prosecution that petitioner was involved in an altercation with the deceased inside a cabaret called The Revelation Club and that petitioner left and returned later to shoot the deceased on the sidewalk outside the club. No eyewitness testified to these

events at the trial, hence the prosecution's reliance upon circumstantial evidence.

The evidence adduced at the pre-trial wade hearing to determine the constitutional validity of an alleged identification of petitioner by one Margaret Zaccario has been fully detailed in Point One, supra.

Upon the trial this witness flatly stated that she could not say that the defendant sitting in the courtroom was the same man whom she had observed in the altercation with the deceased, nor could she state that the man she later saw in the hospital was the man in that altercation with the deceased.

The prosecution then called as a witness Detective Warren O'Brien. The trial Court, relying upon the recently enacted section 60. 25 of the New York Criminal Procedure Law, permitted O'Brien to testify (over objection by the

defense) that O'Brien had accompanied Zaccario to the hospital and, after viewing petitioner in the hospital, told O'Brien that the man in the hospital bed was the man she saw in the earlier altercation with the deceased. O'Brien went on to testify that the man in the hospital bed was the defendant on trial.

We now set forth, in connection with the discussion to follow, certain pertinent dates:

1. The homicide occurred on August 2, 1970

2. Petitioner was arrested and charged with the homicide in question on August 3, 1970.

3. Up to this point, the applicable law regarding such testimony was found in the New York Code of Criminal Procedure, Section 393-b and in the New York Court of Appeals' opinion in People v. Trowbridge, 305 NY 471.

4. Effective September 1, 1971, section 393-b was replaced by section 60. 25 of the New York Criminal Procedure Law.

5. Petitioner's trial occurred thereafter

in late 1972.

We note firstly that at the time of the homicide in 1970 and petitioner's arrest and indictment, the former section 393-b was in effect. That section had long been interpreted by the New York Court of Appeals as prohibiting testimony of the type accepted here by the trial court (People v. Trowbridge, supra, 305 NY 471).

Thus absent the 1971 enactment of section 60. 25 of the Criminal Procedure Law, O'Brien's testimony would have been inadmissible and a reversal of the conviction would have been mandatory. (See opinion of Appellate Division below in Appendix to petition).

The New York Court of Appeals, however, in its opinion below, held that Trowbridge was overruled by the 1971 enactment of section 60. 25 of the Criminal Procedure Law and, conse-

quently, O'Brien's trial testimony as to Zaccario's identification, was now permissible, albeit formerly inadmissible. (See Court of Appeals' opinion, annexed to petition).

The sanction by the Court of Appeals of the trial court's admission in evidence of O'Brien's testimony was a substantial factor in its decision to reverse the Appellate Division's dismissal of the indictment. The Appellate Division had held, contra, that the admission of O'Brien's testimony was error.

It thus becomes apparent that the pre-trial change of the rules of evidence governing hearsay evidence to bolster an alleged identification is ex post facto and a violation of due process of law as to petitioner in the instant case and, as such, prohibited by the United States Constitution, Article I, Section 10, and the 14th Amendment thereto.

See, Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68 (1925); Hopt v. Utah, 110 U.S. 574, 589, 4 S. Ct. 202 (1884); Thompson v. Utah, 170 U.S. 343, 352, 18 S. Ct. 620; Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922 (1898); U.S. v. Henson, 486 F 2d 1292, 1306 (USCA, D.C. Cir., 1973).

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
November, 1975

Respectfully submitted

EVSEROFF & SONENSHINE,
Attorneys for Petitioner

WILLIAM SONENSHINE, ESQ.
Of Counsel

Appendix "A"

Opinion of the Appellate Division, Second Department

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered February 1, 1973, convicting him of manslaughter in the first degree, upon a jury verdict, and imposing sentence.

Judgment reversed, on the law, and indictment dismissed.

Defendant was convicted of manslaughter in the first degree as a lesser included charge, following his trial on an indictment for murder. In our opinion, the evidence adduced at the trial was legally insufficient to warrant the conviction and hence the indictment must be dismissed (CPL 470.20, subd. 2).

The evidence was wholly circumstantial. The decedent died as the result of gunshot wounds inflicted on the sidewalk in front of a discotheque in Brooklyn at about 1:45 A.M. on August 3, 1970. Defendant fled from the scene in a vehicle. He was bleeding profusely from his face at the time from injuries which he might have received in an earlier fight with the decedent. When found, he was incoherent and only semiconscious.

A revolver, whose bullets when fired contained a twist of the same type as bullets removed from the decedent's body (all had eight right twist lands and grooves) and from which six bullets had been discharged, was found three blocks from the scene along the route which defendant's vehicle had passed. Police officers who had had the vehicle under observation at that time did not see anything thrown from the car. An unidentified person at the scene was

observed running away after the shooting in the direction of the place at which the gun was found. A witness who had observed the earlier fight could not make an in-court identification of defendant and was no longer certain that she was correct when, on the day of the shooting, she identified defendant in a hospital room as the person who had fought with the decedent.

In a circumstantial evidence case, the facts from which the controlling inferences are drawn must themselves have been proved and not persumed (see People v. May, 290 N.Y. 369, 371; People v. Lewis, 275 N.Y. 33, 39; People v. Razezicz, 206 N.Y. 249, 269; People v. Kennedy, 32 N.Y. 141, 145-146). Phrased otherwise, the circumstances must be based upon clear and convincing evidence and not conjecture (see People v. Foley, 307 N.Y. 490, 492-493; Richardson on Evidence [9th ed.], § 152). The proof in this case did not meet these standards.

The People sought to prove a motive by showing that the decedent had inflicted the cuts on defendant's face. However, no witness who had seen the fight testified, although the proof established that at least one other person who had been in the decedent's company was present when the fight took place. Further, the police sought to show that the murder weapon had been found abandoned at a point passed by defendant's car. Even were it assumed that the revolver received in evidence was that weapon, it is merely presumptive that it was abandoned by defendant and not by someone else.

The proof of flight is merely equivocal circumstantial evidence (see People v. Yazum, 13

NY 2d 302, 304; People v. Fiorentino, 197 NY 560, 567-568). Such evidence cannot take the place of substantive evidence, particularly in this case in which the proof indicated that other persons also fled from the scene after the shots were fired. Taken as a whole, the evidence did not overcome the danger in the use of circumstantial evidence noted in People v. Cleague (22 NY 2d 363, 367): "The danger, therefore, with the use of circumstantial evidence is that of logical gaps—that is, subjective, inferential links based on probabilities of low grade or insufficient degree—which, if undetected, elevate coincidence and, therefore, suspicion into permissible inference."

We note that error was committed when a police officer was permitted to testify, over objection, that a witness had made an earlier identification of defendant as the person who had fought with the decedent prior to the shooting. We have previously observed that the enactment of section 60.25 of the CPL has not abrogated the rule of People vl Trowbridge (305 N.Y. 471), which states that an identification made by an eyewitness cannot be bolstered by the testimony of another witness of the former's previous identification (People v. Rosati, 39 A D 2d 592; People v. Nival, 41 A D 2d 777). That statute, insofar as pertinent, merely permits, in certain delineated circumstances, testimony that a person previously observed and recognized by an eyewitness is the defendant. It does not permit another witness to bolster the previous identification by testifying that the eyewitness had named

the defendant as the perpetrator.

Rabin, P.J., Latham, Christ and Munder, JJ., concur.

STATE OF NEW YORK
COURT OF APPEALS

Appendix "B"

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2 No. 4
The People, &c .,
Appellants,
vs.
Eugene Lagana,
Respondent.

JANSEN, J.:

Defendant was indicted for murder arising out of the shooting death of Joseph Pendolino. Following a trial, he was found guilty of manslaughter, first degree, which had been submitted to the jury as a lesser included crime. The Appellate Division, holding that the evidence adduced at trial was legally insufficient to warrant a conviction, reversed the judgment of conviction and dismissed the indictment.

The evidence against defendant was wholly circumstantial. Viewed most favorably to the People, the evidence shows that shortly before

Opinion of the Court of Appeals

Pendolino was shot on August 3, 1970, he and defendant were involved in an altercation at a club in which defendant sustained serious cuts. Defendant's participation in this fight was acknowledged by Nicholas Conte, one of his own witnesses. Sometime later, defendant was seen leaving the club and entering his automobile, which he drove back to the front of the building housing the club. He double-parked the car, got out and walked in front of it. While no one could identify defendant as the person who fired the shots, one witness, Marie Greco, testified that the man standing in front of the double-parked car had his hand extended when the shots were fired and that the shots appeared to be coming from that man. There was extensive evidence of defendant's flight from the scene, including testimony that the blood-stained car driven by

defendant failed to stop when police officers several times tried to wave it down, that he attempted to elude police by turning off his lights, that he abandoned his car, scaled a fence, and crawled away, and that he was found hidden under another vehicle. Three hours after the shooting, a pistol was found on the route of defendant's flight from the scene. While this gun marked its bullets in the identical fashion as bullets extracted from the deceased, the ballistics experts could not testify that the bullets found in the deceased necessarily came from that gun. Additionally, one witness, Margaret Zaccario, who had been with the deceased at the club, although not able to identify defendant at trial, did pick defendant out of a room in a hospital ward containing six persons an hour and one-half after the shooting and identified him as the man with whom the de-

ceased had argued earlier in the evening. This identification was made in the presence of Detective O'Brien, who at trial testified concerning this earlier identification.

We have many times held, and have recently reiterated, that for a conviction based exclusively upon circumstantial evidence to stand, the hypothesis of guilt should flow naturally from the facts proved, and be consistent with the, and that the facts proved must exclude to a moral certainty every reasonable hypothesis of innocence. (People v. Benzinger, 35 NY 2d___; People v. Williams, 35 NY 2d 783; People v. Borrero, 26 NY 2d 430, 434-435; People v. Cleague, 22 NY 2d 363, 365-366.) We think the evidence here meets that test. The People's evidence establishes motive, places the defendant at the scene of the crime at the time of the shooting, supports the conclusion that he fired

the shots, and demonstrates clearly defendant's flight from the scene. From all the evidence, the jury could have found beyond a reasonable doubt that the defendant did shoot the decedent with the requisite intent.

The Appellate Division also noted that error was committed when a police officer was permitted to testify, over objection, that a witness had made an earlier identification of the defendant as the person who had fought with the decedent prior to the shooting. Our holding in People v. Nival (33 NY 2d 391) makes it clear that section 60.25 of the Criminal Procedure Law overrules the effect of People v. Trowbridge (305 NY 471) by permitting the fact of the prior identification to be established by the testimony of another person when the identifying witness is unable to make an identification at trial. Detective O'Brien's

testimony that Margaret Zaccario had identified the defendant at the hospital was in conformity with Criminal Procedure Law section 60.25, and, accordingly, the Appellate Division's holding to the contrary, made before our decision in People v. Nival (supra), was incorrect.

Since the Appellate Division's reversal was on the law alone, we reverse and remit to the Appellate Division for determination of the facts. (Crim. Pro. Law, §§470.40[2][b] and 470.25[2][d].)

* * * * * * *

Order reversed and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein, Opinion by Jasen, J. All concur.

ORDER OF AFFIRMANCE BY APPELLATE DIVISION ON REMITTITUR FROM THE COURT OF APPEALS

Appendix "C"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 10, 1975

HON. SAMUEL RABIN, Acting Presiding Justice,
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST Associate Justices
HON. FRED J. MUNDER

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The People of the State of New York,
Respondent,

v.

Eugene Lagana,
Appellant.

Order of Remittitur of the Court of Appeals.

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The above named The People of the State of New York, respondent in this action, having appealed to the Court of Appeals of the State of New York from an order of this court dated January 4, 1974, reversing, on the law, a judgment of the Supreme Court, Kings County, convicting appellant of manslaughter in the first degree, upon a jury verdict, and imposing sentence;

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said order having also dismissed the indictment; the said appeal having been heard and determined by the Court of Appeals and that court having adjudged that the order of this court so appealed from be reversed and having remitted the case to this court for its consideration of the facts; and upon such remand, the said appeal having been submitted by William Sonenshine, Esq., of counsel for the appellant and submitted by Helman R. Brook, Esq., of counsel for the respondent, and the deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate
Division

STATE OF NEW YORK
COURT OF APPEALS

Appendix "D"

BEFORE: HON. JACOB D. FUCHSBERG,
Associate Judge

THE PEOPLEOF THE STATE OF
NEW YORK

-against-

CERTIFICATE
DENYING
LEAVE

EUGENE LAGANA

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460. 20 and upon the record and proceedings herein, *there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The Court en banc previously considered the federal constitutional questions

*Description of Order: Order of the Appellate Division, Second Department dated June 10, 1975 affirming judgment of conviction dated February 1, 1973

raised in this application and resolved them adversely to the appellant (see People v. Lagana, 36 NY 2d 71).

Dated at New York, New York
August 25, 1975

Jacob D. Fuchsberg
Associate Judge

Appendix "E"

Article 1 Section 10 United States Constitution

"No State shall *** pass any*** ex post facto Law***."

Fourteenth Amendment, United States Constitution

"Section 1 *** nor shall any State deprive any person of life, liberty, or property, without due process of law***."

Appendix "F"

Section 393-b of the former Code of Criminal Procedure of the State of New York

§393-b. Testimony of previous identification

When identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification. Added L. 1927, c. 336, eff. Sept. 1, 1927.

Section 60. 25 of New York Criminal Procedure Law

§60. 25. Rules of evidence; identification by means of previous recognition, in absence of present identification

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness that:

(a) Such witness testifies that:

(i) He observed the person claimed by the people to be the defendant either at the

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time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion, but prior to the criminal proceeding, he observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person whom he recognized as the same person whom he had observed on the first or incriminating occasion; and

(iii) He is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion.

2. Under circumstances prescribed in subdivision one, such witness may testify at the criminal proceeding that the person whom he observed and recognized on the second occasion is the same person whom he observed on the first or incriminating occasion. Such testimony, to-

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gether with the evidence that the defendant is in fact the person whom the witness observed and recognized on the second occasion, constitutes evidence in chief. L. 1970, c. 996, §1, eff. Sept. 1, 1971.